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Supreme Court of the United States

October Term, 1956

No. [redacted] 80

JOHN HENRY HARMON, III,

Petitioner,

v.

WILBER M. BRUCKER, individually and as Secretary of the Department of the Army,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Statutory Provisions, and Regulations Involved	3
Statement of the Case	4
A. Petitioner	4
B. Proceedings Subsequent to Discharge	8
C. Administrative Proceedings Subsequent to Filing of Suit	9
D. Court Proceedings	10
Reasons for Granting the Writ	12
I. The Court Below Has Decided Important Questions of Federal Law Which Have Not Been, But Should Be, Decided by This Court	13
II. The Court Below Has Decided Federal Questions in a Way in Conflict With Applicable Decisions of This Court	21
Conclusion	25
Appendix "A"	27
Appendix "B"	33

Citations

CASES:

American Communications Association v. *Douds*, 339 U. S. 382	21, 23, 24
Burns v. *Wilson*, 346 U. S. 137	22
Cantwell v. *Connecticut*, 310 U. S. 296	24
Cole v. *Young*, 351 U. S. 536	21, 23
Cummings v. *Missouri*, 4 Wall. 277	20
Gentila v. *Pace* (C. A. D. C.), 193 F. 2d 924, cert. den., 342 U. S. 943	13, 14
Gonzales v. *United States*, 348 U. S. 407	14

PAGE

CASES (Cont'd):

Hague v. *C. I. O.*, 307 U. S. 496 24
Horylev v. *New York State Bonus Commission* (3d Dept.), 220 App. Div. 345, 221 N. Y. Supp. 548 20
Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U. S. 123 ..... 17, 20, 22
Lawson v. *Housing Authority*, 270 Wis. 269, cert. den. 349 U. S. 941 24
McTernan v. *Rodgers* (D. C. Cal.), 113 F. Supp. 638 ... 24
Patterson v. *Lamb*, 329 U. S. 539 13
Perkins v. *Elg*, 307 U. S. 325 21
Schustack v. *Herren* (2 Cir.), 234 F. 2d 134 ..... 13, 20
Sicurella v. *United States*, 348 U. S. 385 14
Social Security Board v. *Nierotko*, 327 U. S. 358 22
Stark v. *Wickard*, 321 U. S. 288 22
Sterling v. *Constantin*, 287 U. S. 378 22
St. Joseph Stockyards v. *United States*, 298 U. S. 38 22
United States ex rel. Roberson v. *Keating* (D. C. Ill.), 121 F. Supp. 477 22
United States v. *Lovett*, 328 U. S. 303 20
United States v. *Williams*, 278 U. S. 255 14
Wieman v. *Updegraff*, 344 U. S. 183 ..... 17, 21, 24

CONSTITUTION AND STATUTES:

United States Constitution:
Article I 11
Article III 11
First Amendment 11
Fifth Amendment 11
Sixth Amendment 11
Act of June 22, 1944, 58 Stat. 286, 38 U. S. C. 693h 3, 14
Act of August 2, 1946, 60 Stat. 837, 5 U. S. C. 191a 3, 14
Act of May 5, 1950, 64 Stat. 145, 10 U. S. C. 652a 3, 15
Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009 11
Declaratory Judgment Act, 62 Stat. 930, 964, 28 U. S. C. 1331, 2201, 2202 11
District of Columbia Code, §§11-305, 11-306 11

PAGE

CONSTITUTION AND STATUTES (Cont'd):

Uniform Code of Military Justice, Article 31, 64 Stat. 118, 50 U. S. C. 602 4

Universal Military Training & Service Act, 62 Stat. 604, 50 U. S. C. App. 451 *et seq.* 3, 4, 12, 15, 16

MISCELLANEOUS

Army Regulations:
AR 615-360 4
Par. 7 18
Par. 8a 17
Par. 8b 11
AR 615-370 ..... 8, 11
AR 615-375, Par. (2)(b) 4, 18

Comment, *Judicial Review of Army Discharge Procedures*, 9 *Stanford L. Rev.* 170 (Dec., 1956) 14, 25

Department of Defense Directive 5210.9 ..... 4, 12, 15
Par. VII(A) 15
Par. VIII(F)5 16

Digest Opinions, J. A. G. (1912-1930) 18

Hearings, Senate Armed Services Committee on S. 3096, 83d Cong., 2d Sess. (1954) 18, 19

Hearings, Senate Subcommittee, Committee on Post Office and Civil Service, pursuant to S. Res. 20, 84th Cong., 1st Sess. (1955) 23

Hearings, Subcommittee on Constitutional Rights, Senate Judiciary Committee, pursuant to S. Res. 94, 84th Cong., 2d Sess. (1955) 19

Opinions of Attorney General:
13 *Op. Atty. Gen.* 16 18
18 *Op. Atty. Gen.* 427 18

Sandburg, "*Lincoln, The War Years*," Vol. III 18

Watts, "*The Draftee and Internal Security, A Study of the Army Military Personnel Security Program*" (New York, 1955) 16

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

John H. Harmon, III, petitioner herein, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia entered on January 31, 1957, which affirmed the judgment of the District Court for the District of Columbia entered on January 24, 1956, granting respondent's motion for summary judgment and dismissing petitioner's amended complaint.

Opinions Below

The opinions of the Court of Appeals, i.e., the majority opinion of Judge Prettyman and the dissenting opinion of Judge Baselon, have not been officially reported but are set out in Appendix "B", *infra*, pp. 33-57. The opinion of the District Court (J.A.[1] 99-105) is reported at 137 F. Supp. 475.

Jurisdiction

The judgment of the Court of Appeals was entered on January 31, 1957 (R. 77). The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254.

Questions Presented

1. Did the District Court have jurisdiction to review a less than honorable discharge furnished an inducted soldier as a security risk (because of non-criminal, constitutionally-protected conduct, occurring primarily, if not exclusively, prior to induction), and to grant the relief requested by petitioner where the discharge certificate did not accurately reflect the character of petitioner's excellent military record and violated applicable regulations, statutes and constitutional provisions?

2. (a) While Section 4(b) of the Universal Military Training & Service Act may have authorized the Secretary of Defense to remove "security risks" from the Armed Forces, was Department of Defense Directive 5210.9, par. VIII(F)5 (under which petitioner was stigmatized for life with a less than honorable discharge certificate for having engaged in constitutionally-protected and non-criminal con-

[1] The letters "J.A." as used throughout refer to the Joint Appendix as printed for the use of the court below.

duct extraneous to the character of his actual military service) invalidly authorized, *ultra vires* and void?

(b) If not, is Section 4(b) of the Universal Military Training & Service Act, as applied to petitioner, in violation of the First, Fifth and Sixth Amendments to the Constitution of the United States?

3. Petitioner was not found disloyal by respondent, and the character and efficiency of his actual military service up to the time of his discharge were admittedly excellent. His less than honorable discharge as a security risk was based on non-criminal conduct which occurred primarily, if not exclusively, prior to his induction, and was wholly unrelated to the actual character of his miliary service. Moreover, he was given neither a hearing prior to his discharge nor any statement of the reasons why he was declared a security risk, nor any opportunity to confront and cross-examine the witnesses against him. Was the aforesaid action of respondent in furnishing petitioner a less than honorable discharge certificate (which, by reflecting more than a record of military service, brings reproach and dishonor in civilian life and extinguishes petitioner's right to certain valuable state veterans' benefits), in violation of the First, Fifth and Sixth Amendments to the Constitution of the United States?

Constitutional Provisions, Statutory Provisions, and Regulations Involved

The Constitutional provisions involved are the First, Fifth and Sixth Amendments to the Constitution of the United States. The statutes involved are the Act of May 5, 1950, 64 Sat. 145, 10 U. S. C. 652a; Section 4(b) of the Universal Military Training & Service Act, 62 Stat. 606, 50 U. S. C. App. 454(b); the Act of June 22, 1944, 58 Stat. 286, 38 U. S. C. 693h; and the Act of August 2,

1946, 60 Stat. 837, 5 U. S. C. 191a. The Regulations involved are Department of Defense Directive 5210.9, issued April 7, 1954 (set forth in full at pp. 34-45 of the Joint Appendix), Army Regulation 615-375, Paragraph (2)(b), and Army Regulation 615-360, Paragraphs (7) through (9). All Constitutional, statutory and regulatory provisions, except as otherwise noted, are set forth in Appendix "A," *infra*, at pp. 27-32.

Statement of the Case

A. Petitioner

Petitioner, a resident of the State of New York and prospective applicant for admission to the Bar, was duly inducted into the Army on October 31, 1952. Former Private Harmon's induction was accomplished under the provisions of the Universal Military Training & Service Act. 62 Stat. 604, 50 U. S. C. App. 451 *et seq.* (J.A. 2-3, 19).

On May 7, 1953, petitioner was interrogated concerning his beliefs, attitudes, associations and opinions at the Indiantown Gap Military Reservation, Indiantown Gap, Pennsylvania, where he was then stationed (J.A. 91-97). With respect to some of the questions asked by the military authorities, petitioner invoked his privilege against self-incrimination (Uniform Code of Military Justice, Article 31, 64 Stat. 118, 50 U. S. C. 602), but denied membership in the Communist Party.[2]

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[2] On October 22, 1954, petitioner explained his invocation of the privilege against self-incrimination in testifying under oath before the Army Discharge Review Board, as follows:

"Applicant: Well, quite frankly, I was afraid for one reason and, secondly, I did not have the advice of counsel, I was afraid in the sense that when I was first sent up to the Indiantown Gap I was awakened from sleep and introduced to six gentlemen from the Counter Intelligence Corps, and that included the

On February 9, 1954, petitioner was notified by the Adjutant General that he was to reply to certain derogatory information which had been received concerning him, to wit:

Commanding Officer, a stenographer, and a Sergeant-at-Arms, and I was searched and then taken down to G-2 headquarters and there I was questioned by the battery of these gentlemen from the Counter Intelligence Corps. I did not feel that I could truthfully and honestly answer all the questions that were presented to me—when they were thrown at me in such rapid fire. (J.A. 64) * * *

"Member: Mr. Harmon, on the 7th of May, 1953 you were asked certain questions in regard to which have been repeated this morning by your counsel, and at that time you refused to answer those questions, and you tell us this morning you refused based on the fact that you did not have advice of counsel, and you did not know the names of all the organizations that might be listed on the Attorney General's list. * * * I don't see why you had to have advice of counsel to say you did not belong to them.

"Applicant: Well, sir, I will give you an example. When I was interrogated in May of 1953, I mentioned that I was asked questions all at once, and some of the questions ran to this extent. To whom have you given the plans of Indiantown Gap Military Reservation? How long have you been a courier for the Soviet Union or for some of its satellites. My instant reaction was, what is going on here, you know, I hadn't realized that I was such a cloak and dagger personality. I saw that I was afraid, and really being fearful I did not wish to answer these questions for fear I might say something which was not actually the truth (J.A. 71) * * *

"Counsel: Do you think if you had an opportunity to have carefully considered the questions and your answers to the questions, if you had done so in a calm and deliberate atmosphere rather than through fear, do you beleive you would have answered as you did on the investigation report?

"Applicant: I think if I had time to I would have given more or less similar responses that I had given in the file with AGO. (J.A. 84-85) * * *

"Presiding Officer: What were you apprehensive of?

"Applicant: Well, sir, when someone walks in with a group

"That you—

"a. In 1951 and 1952, were employed at Camp Lakeland which was reported to be a Communist operated camp.

"b. In 1949, were employed by the Detroit Urban League which was reported to be a subversive organization.

"c. In 1952, registered to vote in New York City with the American Labor Party. The American Labor Party is cited by the House Committee on Un-American Activities as being under Communist control in New York City.

"d. Solicited contributions of money for the defense of persons under indictment for violation of the Smith Act" (J.A. 3).

The letter also contained derogatory information with respect to petitioner's father and step-mother, who were alleged to have had "subversive" associations, and further stated that petitioner was alleged to have associated with persons who were Communists or Communist sympathizers (J.A. 3-4).

On March 11, 1954, petitioner replied to the letter of allegations, stating that he was not then nor had he ever

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of men, walks into the room here you had just been awakened, as I explained, by my Commanding Officer * * *

"Presiding Officer: Was your Commonding Officer present?

"Applicant: Yes, sir, I don't know how many gentlemen from the CID and a Lieutenant from G-2, a Sergeant with a .45 pistol strapped to his hip, and why someone should come into my room with weapons, I couldn't understand, I was apprehensive.

"Presiding Officer: You were apprehensive for fear they would shoot you?

"Applicant: I can't explain my subconscious reaction at the time.

"Presiding Officer: You were just apprehensive?

"Applicant: That is correct, sir." (J.A. 87)

been a member of the Communist Party, and in answer to the derogatory information with respect to his father and step-mother, petitioner informed the Adjutant General that:

> "It is with deepest moral indignity coupled with a devout sense of filial piety, that I refuse to answer the derogatory statements made under allegations e and f. As neither my father nor step-mother are employed in any capacity by the federal government, I am led to the conclusion that derogatory information concerning them is wholly irrelevant to the case at hand" (J.A. 4-6).

The allegations in the letter of the Adjutant General dated February 9, 1954, related solely to lawful and legal activities and associations which petitioner carried on as part of his civilian life prior to the time of his induction except that (1) petitioner continued his association with his father and step-mother; and (2) in November 1952, he wrote a letter to two friends suggesting that they make financial contribution to assist the defense of two individuals who had been indicted for a violation of the "Smith Act" (J.A. 7-8, 100).

On April 2, 1955, the Adjutant General, by order of the Secretary of the Army, informed petitioner's Commanding Officer that the proposed discharge of petitioner as "disloyal or subversive" under the provisions of Army Regulation 615-370 had not been favorably considered. Instead, petitioner was to be assigned to non-sensitive duty in the lowest pay grade and retained in the Army establishment (J.A. 6-7). At the same time, petitioner was personally informed by the Adjutant General as follows:

> "1. Reference is made to letter from this office dated 9 February 1954.
>
> "2. The allegations in your case and your reply thereto have been reviewed in the Department of the Army. It has been determined that you will be retained in the service in your present grade, that you

> will not be promoted and that upon completion of your term of service you will be discharged with a type of discharge appropriate to the character of service you have rendered as of the date you are eligible for separation.
>
> "By Order of the Secretary of the Army" (J.A. 7, 100.)

However, 55 days later and on May 25, 1954, without notice to petitioner or providing him with a hearing, the Adjutant General, by order of respondent, rescinded the provisions of the previous order and informed petitioner's Commanding Officer that he would be discharged under the provisions of Army Regulation 615-370 and given an "Undesirable Discharge" (J.A. 7, 20). On June 2, 1954, petitioner was separated from the Army of the United States under the provisions of Army Regulation 615-370 at Transfer Point, Camp Pickett, Virginia, with an "Undesirable Discharge Certificate" (J.A. 13, 14).

It is conceded that the character and efficiency of petitioner's service in the Army of the United States from the date of his induction until the date of his discharge was excellent, and petitioner's service record bears two character and efficiency recommendations for excellent service (J.A. 9, 20, 101).[3]

B. Proceedings Subsequent to Discharge

On June 8, 1954, petitioner applied to the Army Discharge Review Board to have the nature of his discharge certificate changed from Undesirable to Honorable. On October 22, 1954, petitioner appeared before the Army Discharge Review Board accompanied by counsel and testified under oath that he had never been a member of the Com-

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[3] * * * * * [I]n its argument [the Government] concede[d] that it has never found [petitioner] either disloyal or loyal." (137 F. Supp. 475, 477.)

munist Party, or of any Communist cell or unit, or of any Communist organization, or of any organization that advocated the overthrow of the government, or of any organization which advocated a policy of approving or advocating the commission of acts of force or violence to deny other persons their rights under the Constitution, or of any organization which seeks to alter the form of government of the United States by un-Constitutional means, or of any organization which, to his knowledge, had engaged in subversive activities of any kind or nature (J.A. 63-68). Petitioner further testified that he was then and had always been completely and unswervingly loyal to the government of the United States and would not hesitate to lay down his life in defense of the United States against any and all of its enemies whomsoever (J.A. 69, 101).

On November 15, 1954, petitioner was informed that his application for a change of his discharge certificate from Undesirable to Honorable had been denied (J.A. 10). Thereupon, petitioner applied to the Army Board for the Correction of Military Records, but on January 27, 1955, his appeal was denied (J.A. 10). On February 1, 1955, petitioner appealed to the Secretary of the Army, but no action was taken, and on May 2, 1955, petitioner commenced suit in the District Court for the District of Columbia.

C. Administrative Proceedings Subsequent to the Filing of Suit

Subsequent to the filing of the complaint, petitioner's counsel was informed by Hugh M. Milton III, Assistant Secretary of the Army, that the Army Board for the Correction of Military Records had been ordered to undertake "a fresh evaluation of the entire case" (J.A. 51-52). On July 7, 1955, petitioner's counsel replied to Mr. Milton's letter and informed him that petitioner had commenced suit, testing the validity of petitioner's "Undesirable Discharge", but nevertheless offered to participate in a hear-

ing before the Army Board for the Correction of Military Records (J.A. 52-53). On July 20, 1955, petitioner's counsel received another letter from Mr. Milton in which he stated that the Executive Secretary for the Army Board for the Correction of Military Records had scheduled a hearing for July 27, 1955, but that the Army could not agree that the discharge certificate was to be based on the character of the soldier's military service (J.A. 54). On July 25, 1955, petitioner's counsel informed Mr. Milton that appellant would not appear before the Army Board for the Correction of Military Records, inasmuch as a hearing before said board "would serve no useful purpose," since the Army and petitioner were in basic disagreement on the law relating to the issuance of discharge certificates (J.A. 55-56). On November 10, 1955, the Assistant Secretary of the Army denied petitioner's application for a correction of his military record (J.A. 57).

D. Court Proceedings

On May 2, 1955, petitioner filed a complaint in the United States District Court for the District of Columbia, praying for a declaratory judgment declaring invalid his "Undesirable Discharge" and for a declaration that the action of respondent was illegal and unconstitutional. An answer was filed on July 19, 1955. Thereafter, an order was entered granting petitioner's motion to amend his complaint by substituting Wilber M. Brucker in place of Robert T. Stevens as defendant in the within action. Defendant Brucker was appointed Secretary of the Army in place of defendant Stevens, who had resigned. It was stipulated by counsel that the answer which was filed was adopted by the substituted defendant.

After filing of the answer, petitioner and respondent cross-moved for summary judgment. On November 28, 1955, respondent was granted leave to amend his answer to allege that, while petitioner's discharge certificate re-

cited that the authority for his discharge was Army Regulation 615-370, petitioner was in fact discharged under the authority of Department of Defense Directive 5210.9, dated April 7, 1954, and that, while respondent admitted that petitioner's service record was marked "excellent" as to character and efficiency for the periods November 12, 1952, to July 24, 1953, and August 2, 1953, to April 24, 1954, the balance of petitioner's service record was marked "Unknown" as to character and efficiency.[4] On January 24, 1956, the District Court below granted respondent's motion for summary judgment on the sole ground that the court had no jurisdiction to review respondent's action (J.A. 105). Jurisdiction of the cause in the District Court was based on Sections 11-305 and 11-306 of the District of Columbia Code, on 28 U. S. C., Sections 1331, 2201 (the Declaratory Judgment Act), 2202 and on 5 U. S. C., Section 1009. Jurisdiction was also based on the First, Fifth and Sixth Amendments to the Constitution and on Articles I and III thereof.

On June 6, 1956, petitioner was notified by respondent that the character of his discharge was changed from "Undesirable" to "General (Under Honorable Conditions)." Thereupon, respondent filed a memorandum in the Court of Appeals suggesting mootness, which was denied by order of the Court of Appeals on August 17, 1956. On January 31, 1957, the Court of Appeals, by a 2-1 vote, affirmed the decision of the District Court, Judge Bazelon dissenting. Appendix "B," *infra*, pp. 33-57.

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[4] However, the "Unknown" ratings are in no way disqualifying. See, AR 615-360, par. 8(b), Appendix "A", *infra*, p. 31.

Reasons for Granting the Writ

The issues presented by this case raise questions of fundamental importance to the Government of the United States, our democratic society, and thousands of young men inducted into the Armed Forces. The decision of the court below permits the Army to stigmatize an inductee as a "security risk" for having engaged, while in civilian life, in constitutionally-protected and non-criminal conduct and associations. Appendix "B," *infra*, p. 43. Inasmuch as Department of Defense Directive 5210.9 affects the discharge certificates of thousands of young Americans inducted into the Armed Forces, and countless others previously released to the inactive reserve, the decision below deprives millions of young Americans (with excellent military records) of honorable discharge certificates, whenever it is asserted in the name of "security" that they are unsuitable for retention in the military establishment.

The issues which this Court is asked to decide arise from Department of Defense Directive 5210.9, establishing the "Military Personnel Security Program" under the authority of Section 4(b) of the Universal Military Training & Service Act, 62 Stat. 606, 50 U. S. C. App. § 454(b). Or, as stated by Judge Bazelon in his dissent below:

> "• • • whether the Universal Military Training & Service Act • • •, 62 Stat. 606, 50 U. S. C. § 454(b), pursuant to which Directive 5210.9 was promulgated, authorizes issuance of less than an 'honorable discharge' certificate, in the circumstances of this case." Appendix "B", *infra*, p. 57.

On the major questions below, the Court of Appeals was divided. Petitioner contends, with Judge Bazelon, that the majority erred. Petitioner's challenge is premised on the fact that since a discharge is a formal, final judgment by the Government on the military record of a soldier, he has a right to an honorable discharge if his military

record merits it, and that in considering the type of discharge certificate to which he is entitled he cannot be held to answer for matters extraneous to that record. As Judge Bazelon makes clear, petitioner does not challenge respondent's power "to remove him from the Army on mere suspicion that he is a security risk. But, whether or not the interests of national security justify dismissing a soldier on mere suspicion, [petitioner] claims that those interests are not served by branding such a soldier as a security risk as he passes through the gate". Appendix "B," *infra*, p. 55.

I

The court below has decided important questions of Federal law which have not been, but should be, settled by this Court.

(a) The District Court denied petitioner relief solely because the District Judge believed he lacked jurisdiction to review the issuance of petitioner's discharge certificate (137 F. Supp. 475, 478). The majority opinion of Judge Prettyman below and the decision of the District Court were both based on the prior holding of the court below in *Gentila* v. *Pace* (C. A. D. C.), 193 F. 2d 924, cert. den. 342 U. S. 943. However, this very question was left unanswered by this Court in *Patterson* v. *Lamb*, 329 U. S. 539,[5] where Mr. Justice Black stated:

> "Whether and to what extent the courts have power to review or control the Department's action in fixing the type of discharge certificate issued to soldiers is a question we need not here determine." *Id.*, at p. 542.

[5] This was also the view of Judge Youngdahl in the District Court (137 F. Supp. 475, 478, n. 4), Judge Bazelon in the dissent below (Appendix "B", *infra*, p. 56), and the late Judge Frank in *Schustack* v. *Herren* (2 Cir.), 234 F. 2d 134, 135, n. 1.

In 1944, Congress created the Army Discharge Review Board, 58 Stat. 286, 38 U. S. C. 693h. Thereafter, it authorized establishment of the Army Board for the Correction of Military Records. 60 Stat. 837, 5 U. S. C. 191a. These statutes made determinations of the Army Discharge Review Board "final, subject only to review by the Secretary of the Army." 58 Stat. 286, 38 U. S. C. 693h; and determinations of the Army Board for the Correction of Military Records "final and conclusive on all officers of the government except when procured by means of fraud." 60 Stat. 837, 5 U. S. C. 191a. *Gentila* v. *Pace, supra,* involved a "dishonorable discharge" for desertion which the veteran was seeking to have set aside, alleging insanity at the time of desertion. In that case, the court below held that Congress had precluded review of the Army Discharge Review Board's "erroneous findings of fact." *Id.,* 193 F. 2d at p. 927. However, when it is considered that in the instant case the District Court said: "[T]he discharge certificate * * * has tangible and practical consequences in civilian life. To an Honorable discharge accrue property rights, civil rights, and community respect and honor * * * [but] one receiving an adverse discharge certificate must expect to encounter substantial prejudice in civilian life" (137 F. Supp. 475, 478), we think it evident that the action of respondent was reviewable,* and that the majority opinion below is in apparent conflict with the principles enunciated by this Court in *Williams* v. *United States,* 278 U. S. 255, 257-8. *Cf. Sicurella* v. *United States,* 348 U. S. 385, 391; *Gonzales* v. *United States,* 348 U. S. 407.

In petitioner's case, the issue is one of law. Judge Bazelon states the problem clearly:

> "The issue [petitioner] raises is one of law; Whether [respondent] may withhold an honorable discharge

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* See, Comment, *Judicial Review of Army Discharge Procedures,* 9 Stanford L. Rev. 170-182 (Dec., 1956).

> from a soldier whose conduct and efficiency ratings have never been less than 'excellent,' even assuming the correctness of all the information [respondent] relies upon. That claim being 'wholly dependent upon a question of law' it is within the jurisdiction of the District Court • • • Nothing in *Gentila v. Pace, supra,* is to the contrary. *Nor can I accept it as settled (either by this court or the Supreme Court) that courts may not in circumstances like these review the issuance of a less than honorable discharge.*" (Appendix "B," infra, pp. 55-56, emphasis supplied.)

Whether, and to what extent, the courts have power to review the type of discharge certificate issued in the circumstances of this case is an important question of Federal law which has not been, but should be, settled by this Court.

(b) The Universal Military Training & Service Act authorizes the Secretary of Defense to prescribe *procedures* for the various Armed Services, in providing for the discharge of persons inducted under the Universal Military Training & Service Act. 62 Stat. 606, 50 U. S. C. App. 454(b). Congress has also authorized the Secretary of the Army to establish procedures for the discharge of individuals from the Army prior to the expiration of their normal terms of service, 64 Stat. 145, 10 U. S. C. 652a. Purporting to act in accordance with this statutory authority, the Secretary of Defense issued Department of Defense Directive 5210.9 on April 7, 1954. The Directive provides that the standard for retention in the Armed Services shall be that retention shall not be inconsistent with the interests of national security. *Directive, Par. VII(A)* (J.A. 36). The Directive further provides that the character of the separation certificate of the individual not retained *"shall be predicated upon the gravity of the*

reasonably substantiated information in derogation." Directive, Par. VIII(F)5 (J.A. 43, emphasis supplied).

Petitioner concedes that the Directive, to the extent it requires the removal of any soldier from the Army where retention is "not clearly consistent with the interests of national security" is validly authorized. 62 Stat. 606, 50 U. S. C. App. 454(b). But to the extent the Directive requires that the character of the soldier's separation certificate *"shall be predicated upon the gravity of the reasonably substantiated information in derogation,"* petitioner contends that it was not validly authorized, and was *ultra vires*, unconstitutional and void. Stated another way: While Congress may have authorized the Secretary of Defense to remove "security risks" from the Armed Forces. Congress did not, and could not, authorize him or the Secretary of the Army, or anyone else, to stigmatize an inductee for life with a less than honorable discharge by reason of constitutionally-protected pre-induction associations and activities which had nothing to do with the character of the actual military service the soldier performed.[1]

The Universal Military Training & Service Act is based on the policy "that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance wtih a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy." 62 Stat. 604, 50 U. S. C. App. 451(e). Such a "fair and just" system of selection could not in a democratic state include a political test. And it does not, so far as the Selective Service System is concerned. Men are selected quantitatively upon Armed Forces requi-

[1] See, Watts, *"The Draftee and Internal Security,* A Study of the Army Military Personnel Security Program," (New York, 1955), pp. 6-9.

sitions of need in accordance with legal restrictions upon the size of the military establishment. They are selected qualitatively upon just and clearly defined criteria for classification and generally fair provisions for hearing and appeal. But just because the Selective Service System has declared a person eligible for and liable to induction, however, does not mean that he will be inducted. The Army exercises its veto power over the selection at the point of induction and thereafter. The Army reserves the right to reject anyone it sees fit for whatever reason it sees fit. What is pertinent here, however, is not the validity of the political criteria employed by the Army in making such rejections after induction, but the validity of such criteria in stigmatizing a record of military service which, on other than political considerations, warrants an "Honorable Discharge." Cf. *Joint Anti-Fascist Refugee Committe* v. *McGrath*, 341 U. S. 123, 139-140, 160; *Wieman* v. *Updegraff*, 344 U. S. 183, 190-191.

Ordinarily, subject to the exception spelled out in the Department of Defense Directive:

> "An honorable discharge certificate will be furnished when the individual meets the following qualifications:
>
> (1) Has character ratings of at least 'very good.'
>
> (2) Has efficiency rating of at least 'excellent.'
>
> (3) Has not been convicted by a general court-martial.
>
> (4) Has not been convicted more than once by a special court martial." AR 615-360, Par. 8a (Appendix "A", *infra*, at pp. 30-31).

An honorable discharge is a badge of honor, but it is limited to time and place and the particular character of the military service rendered. It is not a certification that a man has not been a rogue in civilian life or that he will

not become one after he is discharged.[8] In 1954, former Secretary of the Army Stevens stated:

> "The traditional policy of the Army has been that the discharge given should reflect the service rendered. In other words, a man whose conduct has been faithful and honest during the time in service would be entitled to separation under honorable conditions, notwithstanding what his conduct may have been prior to entering the service." *Hearings, Senate Armed Services Committee on S. 3096*, 83rd Cong., 2d Sess., March 18, 1954, at p. 75.[9]

Nevertheless, the majority below held that the Army is not required to give an honorable discharge "to an enlisted man when it finds, on the basis of pre-induction activities, that his presence in the armed forces is not consistent with the national security." Appendix "B", *infra*, p. 43. Surely, such a fundamental issue is for this Court to decide.

Whether Section 4(b) of the Universal Military Training & Service Act, pursuant to which Directive 5210.9 was promulgated, authorizes the issuance of a less than honorable discharge certificate to a soldier with ratings of "excellent" (for non-criminal, constitutionally-protected conduct occurring primarily, if not exclusively, prior to induc-

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[8] See, AR 615-375, par. 2(b); AR 615-360, par. 7; 13 Op. Atty. Gen. 16 (1869); 18 Op. Atty. Gen. 427 (1886). In 1918, the Army's Judge Advocate General ruled: "A soldier who was dishonorably discharged in a previous enlistment was inducted in the service during the present emergency and served honestly and faithfully. Under such circumstances he is entitled to an Honorable Discharge at the end of his present service. A bad record in a prior enlistment is immaterial in considering the character of the discharge to be granted from his present enlistment." *Dig. Op., J. A. G.* (1912-1930), Section 271, p. 128, No. 220.89, Nov. 30, 1918.

[9] To our knowledge, the first historical precedent was established by President Lincoln in 1864 in the case of Captain E. W. Andrews. See, Sandburg, *III, "Lincoln" (War Years)*, pp. 294-296.

tion) is an important question of Federal law which has not been, but should be, settled by this Court. Inasmuch as the decision below affects inducted personnel of all the armed services, including inactive reservists, it is of such vital importance as to require this Court to grant certiorari.

(c) The court below held that inasmuch as petitioner conceded that the Army could discharge him on mere suspicion that he was a security risk, "it could include that consideration among the factors to be considered in determining the value of his services, and, consequently, in selecting the type of discharge to be given him." Appendix "B", *infra*, p. 43.[10] Accepting this assertion on its face,

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[10] Respondent's argument, apparently adopted by the majority below, that the Army's concern with "moral and discipline is sufficient justification * * * for its policy of not giving security risks the same award of honorable service given exemplary soldiers" (Appellee's Br. p. 24) is absurd. See, *e.g.*, testimony of Hugh M. Milton II, Assistant Secretary of the Army, *Hearings, Subcommittee on Constitutional Rights, Senate Judiciary Committee, pursuant to S. Res. 94*, 84th Cong., 2d Sess., November 22, 1955, pp. 529-530. The historical facts demonstrate that a man's parents, allegedly "subversive," or his political "state of mind," do not militate against his being an "exemplary soldier." A most cogent example during World War II was the 442nd Regimental Combat Team. This organization, which won a Presidential unit citation for heroism in combat in the European Theatre of Operations, was made up of Nisei, most of whose parents were imprisoned in detention camps during World War II because of suspected "disloyalty." While it may be inconceivable to the Secretary of Defense (See, *Hearings before the Senate Armed Services Committee on S. 3096*, 83rd Cong., 2d Sess., March 18, 1954, p. 44), these realistic "security risks" were given honorable discharges upon their separation from the military service "the same as the millions of fine men that have fought for our Nation and have given loyal service" (*Ibid.*). To say that the members of the 442nd Regimental Combat Team were not "exemplary soldiers" is to mock the graves of Japanese-Americans scattered along the Italian peninsula. To say that a soldier who has served the military with a rating of "excellent" is not an "exemplary soldier" merely because of a supposed undesirable "state of mind" or because his parents are accused of being Communists, is to distort our democratic institutions and the American military tradition.

it is readily apparent that what Judge Prettyman is saying is that if, on the basis of non-criminal acts and associations extraneous to the character of an inductee's military service, the Army can determine that the inductee's "state of mind" during his period of service was not a desirable one, then the Army has the right to visit a less than honorable discharge upon the inductee, whether or not that "state of mind" induced overt or affirmative acts considered derogatory in connection with his military duties. But cf. *American Communications Association* v. *Douds*, 339 U. S. 382, where the late Mr. Justice Jackson said: "[t]hought control is a copyright of totalitarianism and we have no claim to it." *Id.* at p. 442.

We think it clear that the action of respondent in this case violated the First, Fifth and Sixth Amendments to the Constitution. Here, at least in part, the issues are petitioner's right to freedom from government defamation and the manner in which the destruction of his good name and personal honor was accomplished.[11]

Rights to freedom of thought, association and belief cannot be infringed by government action defaming and dishonoring an individual who has exercised them, espe-

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[11] The holding of the court below that petitioner's rights under the Sixth Amendment were not infringed is, we think, unrealistic. We believe that petitioner could not have been given a less than honorabl discharge as a security risk without all the safeguards of a judicial trial, or, in the alternative, the safeguards of a general court-martial under the Uniform Code of Military Justice, 64 Stat. 108, *et seq.*, 50 U. S. C. 551, *et seq.* See, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; *United States* v. *Lovett*, 328 U. S. 303; *Cummings* v. *Missouri*, 4 Wall. 277, 321-322. This is especially true in the instant case, since not only are petitioner's job opportunities and reputation seriously impaired, but his right to state veterans' benefits is virtually extinguished. See, *Schustack* v. *Herren* (2 Cir.), 234 F. 2d 134, 135, n. 2; *Horylev* v. *New York State Bonus Commission* (3d Dept.), 220 App. Div. 345, 221 N. Y. Supp. 548.

cially when such action cannot be justified in the national security interest. Cf. *Cole* v. *Young*, 351 U. S. 536. We think that constitutional protection attaches, not to petitioner's separation from the Army establishment, but to the stigmatization of his record of military service (a "badge of infamy"), which, on other than political considerations, warranted an "Honorable Discharge." We think that such action, in no way justifiable in the national security interest, was arbitrary and, thus, a violation of "substantive due process." See, *e.g.*, *American Communications Association* v. *Douds*, 339 U. S. 382, 402; *Wieman* v. *Updegraff*, 344 U. S. 183.

Whether the Universal Military Training and Service Act, as applied to petitioner, violates the First, Fifth and Sixth Amendments to the Constitution is an important quesion of Federal law which has not been, but should be, settled by this Court.

II

The court below has decided Federal questions in a way in conflict with applicable decisions of this Court.

(a) While petitioner demanded relief requiring respondent to issue him an honorable discharge certificate (J.A. 11), he demanded in the first instance that the District Court declare invalid the action denying him an honorable discharge for unconstitutional and illegal reasons (J.A. 11, 25-26). Thus, even if we assume, *arguendo*, that the District Court lacked jurisdiction to interfere with respondent's discretion and compel him to issue petitioner an honorable discharge certificate, we think it had ample jurisdiction to declare invalid respondent's denial of an honorable discharge for such reasons. See, *e.g.*, *Perkins* v. *Elg*, 307 U. S. 325, 349-350. As Judge Bazelon's dissent makes clear:

> "That [petitioner] seeks, in addition to a declaration that the discharge given him was void, an order that

> he be given an honorable discharge does not, in my view, deprive the District Court of jurisdiction. If, upon review, the discharge given [petitioner] is declared to be void, we must assume that the Secretary would issue a discharge which is not void * * *. Moreover, if the District Court finds the denial of an honorable discharge to rest on legally insufficient grounds, it may, at least, enjoin a denial for such reasons." Appendix "B", *infra*, at pp. 56-57.

Moreover, even in those cases ordinarily free from judicial scrutiny, or where Congress has said that administrative action is "final," judicial review may be had where the action challenged is bottomed on an unconstitutional, invalidly authorized, or *ultra vires* administrative regulation. See, *Stark* v. *Wickard*, 321 U. S. 288, 309-310; *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369; *St. Joseph Stockyards* v. *United States*, 298 U. S. 38, 52; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 140, 157. Such is petitioner's contention here.

The District Court recognized that the discharge certificate has tangible and practical consequences in civilian life. "To an Honorable discharge accrue property rights, civil rights, and community respect and honor * * *" (137 F. Supp. 475, 478). See also: *United States ex rel. Roberson* v. *Keating* (D. C. Ill.), 121 F. Supp. 477, 479. Thus, since this Court has said that "the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions," *Sterling* v. *Constantin*, 287 U. S. 378, 401, we think the right to judicial review is clear. *Burns* v. *Wilson*, 346 U. S. 137, 142. See also, the classic statement of this principle by Mr. Justice Brandeis in *St. Joseph Stockyards* v. *United States*, 298 U. S. 38, at p. 77 (concurring).

By reason of the effect of Department of Defense Directive 5210.9 on the lives, liberty and property of millions of American citizens, who, under our statutes, are drafted

into military service, the question of "reviewability" is of paramount significance. The court below has decided this question in a way in conflict with the applicable decisions of this Court.

(b) Petitioner's First Amendment rights were abridged when he was furnished a less than honorable discharge as a security risk. See, *American Communications Association* v. *Douds*, 339 U. S. 382. In that case, Chief Justice Vinson stated:

> "But • • • the fact that no direct restraint or punishment is imposed on speech or assembly does not determine the • • • question. Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes. A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature." *Id.*, 339 U. S. at p. 402.

Petitioner's "identifying arm-band" is his less than honorable discharge certificate, worn for life by reason of the exercise of his First Amendment rights. Furthermore, the *Douds* case specifically holds that a limitation on First Amendment guarantees is permissible only when that limitation finds justification in the safety of the community or the safety of the Nation. Cf. *Cole* v. *Young*, 351 U. S. 536. But here, we think there is no justification in the interests of national security for furnishing petitioner a discharge certificate, which instead of reflecting his record of excellent military service, brings him reproach and dishonor in civilian life.[12] See, *e.g.*, *McTer-*

[12] Insofar as the public is concerned, the term "security risk" is synonymous with "traitor," See, *e.g.*, *Hearings, Senate Sub-committee, Committee on Post Office and Civil Service, pursuant to S. Res. 20*, 84th Cong., 1st Sess., June 3, 9, 23, August 30, 31, 1955 at pp. 67, 121-122, 130, 271, 550, 573, 599, 627.

nan v. *Rodgers* (D. C. Cal.), 113 F. Supp. 638, 640; *Lawson* v. *Housing Authority*, 270 Wis. 269, cert. den. 349 U. S. 941. Nevertheless, the majority below said: "Activity in the Communist movement now involves a possible conspiratorial participation dangerous to the security of this country * * *. Activity in the world Communist movement has long since passed the boundaries of mere political opinion. It may well make a man a security risk, and, as we have pointed out, the courts cannot compel the Army to retain in its service a security risk." Appendix "B," *infra*, at p. 46. Whatever a "security risk" is, we agree that the courts cannot compel the Army to retain "one" in its service. *But we think this argument beside the point!* Petitioner took pains to make clear below that the First Amendment issue of his case had nothing to do with his retention in or discharge from the military establishment. It was applicable only to the "badge of dishonor" worn for life because of legal acts and associations, and because he was the son of a man "reported to be a member of the Communist Party" (J.A. 3). Our assertion is fortified by Judge Bazelon:

> "[Petitioner] does not challenge the [respondent's] power to remove him from the Army on mere suspicion that he is a security risk. But, whether or not the interests of national security justify dismissing a soldier on mere suspicion, [petitioner] claims that those interests are not served by branding such a soldier as a security risk as he passes through the gate." Appendix "B," *infra*, p. 55.

The decision below is in conflict with the principles enunciated by this Court in such cases as *Cantwell* v. *Connecticut*, 310 U. S. 296, 303; *American Communications Association* v. *Douds*, 339 U. S. 382, 402; *Hague* v. *C. I. O.*, 307 U. S. 496, and *Wieman* v. *Updegraff*, 344 U. S. 183. Because of its effect on soldiers drafted into the armed services, the "First Amendment" question raised by peti-

tioner in this case should be resolved by this Court, not only because it is a vital issue of Federal law, but because the court below has decided this question in a way in conflict with the applicable decisions of this Court.

Conclusion

The importance of the instant case is pointed up by a recent comment on Army discharge procedures in a leading law review:

> "The principal case [Harmon] is one of several cases recently decided in the lower federal courts involving judicial review of military discharge proceedings. In none of the decisions was the relief sought granted. However, inherent in each of these claims for federal relief are two distinct questions: (1) Do the lower federal courts have jurisdiction to grant review? (2) Once jurisdiction is recognized, to what extent will the courts review the proceedings. The *Harmon* case is particularly significant because it, unlike the other cases, has squarely raised the first of these problems." Comment, *Judicial Review of Army Discharge Procedures*, 9 *Stanford L. Rev.* 170, 171-172 (Dec., 1956).

The determination below means that the Army, through its discharge procedures, has the power to affect in a serious way the constitutional liberties and property of young Americans inducted into the military service, without any check at all from the courts. Moreover, since discharge certificates of this type are really dishonorable, their stigma may permanently cripple the victim's reputation and earning capacity. Authority to work such consequences in derogation of long-established American military tradition

to the contrary should not be lightly implied. Petitioner asserts, as did Judge Bazelon, that it does not exist. The questions he raises are ones which this Court should decide.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

Constitution

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutes

Act of May 5, 1950, 64 Stat. 145, 10 U. S. C. 652a.

"No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, except in the manner prescribed by the Secretary of the Department of the Army, or by sentence of a general or special court-martial."

Section 4(b) of the Universal Military Training & Service Act of 1948, 62 Stat. 606, 50 U. S. C. App. 454(b).

"Each person inducted into the Armed Forces under the provisions of subsection (a) of this section shall serve on active training and service for a period of twenty-four consecutive months, unless sooner released, transferred, or discharged in accordance with procedures prescribed by the Secretary of Defense (or the Secretary of the Treasury with respect to the United States Coast Guard) or as otherwise prescribed by subsection (d) of section 4 of this title [subsection (d) of this section]."

Act of June 22, 1944, 58 Stat. 286, 38 U. S. C. 693h.

"The Secretary of the Army, the Secretary of the Air Force, and the Secretary of the Navy, after conference with the Administrator of Veterans' Affairs, are authorized and directed to establish in the Army, Air Force and Navy Departments, respectively, boards of review composed of five members each, whose duties shall be to review, on their own motion or upon the request of a former officer or enlisted man * * * the type and nature of his discharge or dismissal, except a discharge or dismissal by reason of

the sentence of a general court martial. Such review shall be based upon all available records of the service department relating to the person requesting such review, and such other evidence as may be presented by such person. Witnesses shall be permitted to present testimony either in person or by affidavit and the person requesting review shall be allowed to appear before such board in person or by counsel * * * Such board shall have authority, except in the case of a discharge or dismissal by reason of the sentence of a general court martial, to change, correct, or modify any discharge or dismissal, and to issue a new discharge in accord with the facts presented to the board. The Articles of War and the Articles for the Government of the Navy are amended to authorize the Secretary of the Army, the Secretary of the Air Force, and the Secretary of the Navy to establish such boards of review, the findings thereof to be final subject only to review by the Secretary of the Army, the Secretary of the Air Force, or the Secretary of the Navy, respectively * * *"

Act of August 2, 1946, 60 Stat. 837, 5 U. S. C. 191a.

"(a) The Secretaries of the Army, Navy, and Air Force, respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective Departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or remove an injustice, and corrections so made shall be final and conclusive on all officers of the Government except when procured by means of fraud * * *"

Regulations

Army Regulation 615-375, Paragraph (2)(b).

"The purpose of a discharge certificate is to record the separation of an individual from the military service and to specify the character of service rendered during the period covered by the discharge."

Army Regulation 615-360, Paragraphs (7) through (9).

"FACTORS GOVERNING ISSUANCE OF HONORABLE AND GENERAL DISCHARGE CERTIFICATES

7. *General considerations.*—Because the type of discharge may significantly influence the individual's civilian rights and eligibility for benefits provided by law, it is essential that all pertinent factors be considered so that the type of discharge will reflect accurately the nature of service rendered. It is the policy of the Department of the Army to base evaluation of an individual's service and character on his over-all enlistment period rather than on any disqualifying entries in his service record during a particular portion of his current service. The effects of an honorable discharge and a general discharge are identical and entitle an individual so discharged to full rights and benefits. The undesirable discharge may or may not deprive the individual of veteran's benefits administered by the Veterans Administration and a determination by that agency is required in each individual case to fix the individual's rights. A dishonorable discharge deprives the individual of all veteran's benefits and may operate to deprive him of civil rights.

8. *Honorable discharge.*—a. Except as provided in these regulations and pertinent regulations listed in paragraph 13, an honorable discharge certificate will be fur-

nished when the individual meets the following qualifications:

(1) Has character ratings of at least 'very good.'

(2) Has efficiency ratings of at least 'excellent.'

(3) Has not been convicted by a general court-martial.

(4) Has not been convicted more than once by a special court-martial.

b. Notwithstanding the foregoing criteria, when disqualifying entries in the individual's service record during current service are outweighed by subsequent honest and faithful service over a greater period of time, an honorable discharge may be furnished. Ratings of "unknown" and ratings for periods of less than 2 months are not disqualifying. (See par. 37a (2), SR 615-20-1.) In addition, careful consideration will be given to the nature of the offense and sentence adjudged by a court-martial in applying the provisions of a (3) and (4) above, and when, in the opinion of the officer effecting discharge, these have not been too serious and severe, and the remainder of the service in the enlistment has been such that an honorable discharge would have been granted had the conviction not occurred, an honorable discharge certificate may be awarded.

9. *General discharge.*—Individuals discharged under honorable conditions which do not qualify them for an honorable discharge will be furnished a general discharge, except as provided below. Officers effecting discharge are authorized and required to deviate from this criteria and furnish an honorable discharge when, after considering all aspects of the individual's service, it appears that furnishing a general discharge would not be in the best interest of the service or the individual. Specifically, the above criteria may be deviated from in the following instances:

a. Regardless of previous record, an individual who has received a decoration or award, including a commendation ribbon or a lifesaving medal, will, provided his record subsequent to the act for which he was decorated, awarded, or commended would so entitle him, be furnished an honorable discharge.

b. An individual being separated with severance pay under the AR and SR 600-450-series will normally be furnished an honorable discharge.

c. When it is apparent from inconsistent entries in the service record that furnishing a general discharge is not warranted, an honorable discharge may be furnished (i. e., when ratings given are disqualifying but promotion with no subsequent reduction was given during period covered or when disqualifying ratings were given but individual was favorably considered for Good Conduct Medal at the same time).

APPENDIX "B"

Opinion of the Court of Appeals for the District of Columbia Circuit

No. 13230

JOHN H. HARMON, III,

Appellant,

v.

WILBER M. BRUCKER, Individually and as Secretary of the Department of the Army,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided January 31, 1957

Before PRETTYMAN, BAZELON and DANAHER, Circuit Judges.

PRETTYMAN, *Circuit Judge*: John Henry Harmon, III, was inducted into the Army on October 31, 1952, under the Universal Military Training and Service Act of 1948.[1] In May, 1953, some questions concerning membership in and relations with the Communist Party, and similar matters, were addressed to him by Army officials. He replied under oath, answering some questions and refusing to answer others on the ground of possible self-incrimination; his answers were reduced to writing and signed by him. In February, 1954, he was notified by the Adjutant General of the Army that he should reply to certain derogatory information which had been received

concerning him. This derogatory information was itemized in seven specifications, "a" to "g". Items "a" through "d" and Item "g" concerned reported activities on Harmon's part, Item "e" activity on his father's part, and Item "f" activities on his stepmother's part. Harmon replied to the items concerning himself, but as to Items "e" and "f" he said: "It is with deepest moral indignity coupled with a devout sense of filial piety, that I refuse to answer the derogatory statements made under allegations e and f. As neither my father nor stepmother are employed in any capacity by the federal government, I am led to the conclusion that derogatory information concerning them is wholly irrelevant to the case at hand." Thereafter Harmon was informed that his discharge as disloyal or subversive under Army Regulation 615-370 had not been favorably considered and that he would be retained in the service in his then-present grade. Shortly thereafter the Secretary of Defense issued Directive 5210.9, the purpose of which was to apply to military personnel the security programs established by Executive Order 10450 in respect to civilian Government employees. It directed that the standard for retention within the armed services should be "that on all the available information it is determined that the * * * retention is clearly consistent with the interests of national security." The directive was accompanied by a memorandum from the Secretary, directing that a review be made of all cases which had theretofore been cleared. Thereupon Harmon's case was reviewed, and the Army Personnel Board found that his further retention in the service was inconsistent with the interests of national security and recommended that he be discharged with an undesirable discharge. On June 2, 1954, he was discharged as undesirable. Harmon appealed to the Army Discharge Review Board to have the character of his discharge changed from undesirable

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[1] 62 Stat. 604, 50 U.S.C.A. App. § 451 *et seq.*

to honorable. He was given a hearing, at which he appeared, and thereafter his application for a change was denied. He applied to the Army Board for the Correction of Military Records for the change in his discharge, and that application was denied. He then made a direct request to the Secretary for award of an honorable discharge, and this request was reviewed by an Assistant Secretary, who referred it to the Board for the Correction of Military Records. Harmon declined a hearing before that Board, stating that he had no additional facts to present. He took the position that the discharge certificate must accurately and adequately reflect the character of his military service and that, inasmuch as the character of this service, as set forth in his service record, was "excellent", he should receive an honorable discharge. The Board recommended against a change in the discharge, and the Assistant Secretary approved that recommendation.

Harmon filed a complaint in the District Court, praying that the action of the Secretary in discharging him with an undesirable discharbe be declared null, void and illegal as in violation of the Constitution, the statutes, and Army regulations; and that his discharge be ordered changed from undesirable to honorable. On February 3, 1956, the District Court granted the Secretary's motion for summary judgment, on the ground that the court lacked authority to review, control or compel the granting of particular types of discharge certificates to persons discharged from the Army.[2] Harmon appealed. Thereafter the Army Discharge Review Board, in the course of a general review of military personnel security cases. reviewed Harmon's case, and the character of his discharge was changed from undesirable to general under honorable conditions. He was thereupon issued a discharge certificate reading:

GENERAL DISCHARGE

Under Honorable Conditions

from the Armed Forces of the United States of America

This is to certify that

John Henry Harmon III US51 207 184 Private AUS

was Discharged from the

ARMY OF THE UNITED STATES

on the 2d day of June 1954 under honorable conditions

[Signed] R L Richstatter
R L RICHSTATTER
Captain Adjutant General's Corps

The Secretary suggested to this court that the case thus became moot. Harmon opposed the suggestion, upon the ground that the controvery was whether he should receive an honorable discharge. This court, on August 17, 1956, by order denied the Secretary's suggestion of mootness.

The alleged derogatory information concerning Harmon which was incorporated in Items "a", "b" and "c" of the initial notice of the Adjutant General concerned activities in 1951 and 1952 in a camp reported to be Communist-operated, employement in 1949 in an organization reported to be subversive, and registration in 1952 with the American Labor Party, cited by the House Committee as being under Communist control. All these alleged activities were prior to Harmon's induction into the Army. Item "d" was that Harmon "Solicited contributions of money for the defense of persons under indictment for violation of the Smith Act." Within a month after his induction into the Army Harmon wrote a letter to two friends, suggesting that they make a financial contribution to assist in the defense of two individuals who had been indicted under the

[2] Harmon v. Brucker, 137 F. Supp. 475 (1956).

Smith Act. Item "g" was that Harmon had been "Associated with persons who were Communists or Communist sympathizers." In response to this item Harmon said he was not then nor had he ever been a member of the Communist Party but that in the course of appearances before many groups and audiences it was quite possible that he had known or been acquainted with Communists or their sympathizers.

In respect to Harmon's military service the Secretary says that his (Harmon's) service record was marked "excellent" for the periods November 12, 1952, to July 24, 1953, and from August 2, 1953, to April 24. 1954, and that for the balance of his service his record was marked "unknown" as to character and efficiency.

As the case is now before us, the questions are (1) whether the court can declare null and void the action of the Secretary in discharging Harmon with a "General Discharge under Honorable Conditions" and (2) whether the court can order the Secretary to change Harmon's Conditions" to "Honorable Discharge". We agree with the District Judge that the court cannot take either of such actions.

The nub of Harmon's contention on the first question is that he is entitled to judicial review of the Army's action. He does not contend that he could not be discharged; his complaint goes to the type of discharge given him. He was accorded all the procedural steps established by the Army regulations for the consideration and determination of the propriety of discharges from the military service. As we have pointed out, he specifically told the Army authorities that he had no further facts to present. No statute was misapplied in the process or the substance of the discharge. No statute directs or authorizes judicial of Army discharges. Indeed the statute provides that decisions of the Army boards shall be final.[3] Thus Har-

[3] Act of June 22, 1944, 58 Stat. 286, as amended, 38 U. S. C. A. § 693h.

mon's argument must rest upon constitutional grounds: that as a matter of due process of law or by some other constitutional requirement he was entitled to court review of the type of discharge which he should be given.

The Constitution provides that the President shall be Commander in Chief of the Army and Navy of the United States[4] and that Congress shall have power to make rules for the government and regulation of the land and naval forces.[5] Title 10 of the United States Code clearly expresses a Congressional intent that the Army be administered solely by the executive branch of the Government.[6] The statute in effect at the time of Harmon's discharge provided[7] that "No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, *except in the manner prescribed by the Secretary of the Department of the Army*, or by sentence of a general or special court-martial." (Emphasis ours.) Throughout our history the Articles of War and similar statutes have entrusted to the Secretary of War and his agents the granting of certificates of discharge.[8] The statute which authorized the Secretary to establish a board to review the types and natures of discharges specifically provided that the findings of such a board should be "final subject only to review by the Secretary of the Army".[9] The courts have

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[4] Art. II, § 2, cl. 1.

[5] Art. 1, § 8, cl. 14.

[6] 10 U. S. C. § 3012 (1956) [formerly 5 U. S. C. A. § 181—4, 64 Stat. 264 (1950)].

[7] 41 Stat. 809 (1920), as amended, 10 U. S. C. A. § 652a (Supp. 1956) [now 10 U. S. C. § 3811 (1956)].

[8] Winthrop, Military Law and Precedents 547, 931, 933, 961, 972 (2d ed. 1920); Act of April 2, 1806, 2 Stat. 359, 361; Rev. Stat. § 1342, Art. 4 (2 ed. 1878); Sec. 4(b), Selective Service Act of 1948, 62 Stat. 606, as amended, 50 U. S. C. A. App. §2454(b).

[9] *Supra* note 3.

held many times that they have no power to review the administrative processes by which the President and the Secretaries administer the affairs of the Army, and this doctrine has extended to the nature of discharges from the service.[10]. On 2this subject we said in *Gentila v. Pace*:[11]

> "We think Congress intended that the Board's [the Army Discharge Review Board's] full and 'final' review should not be subjected to a further review, or series of reviews. in the courts. We may suppose that Congress considered the heavy burden that would be imposed upon courts if they were required to review the findings upon which Army discharges are based. As the Supreme Court has said in regard to a type of dispute for which the Railway Labor Act provides, the 'intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law.' Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, 305, 64 S. Ct. 95, 99, 88 L. Ed. 61."

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[10] United States v. Eliason, 41 U. S. (16 Pet.) 291, 301-302, 10 L. Ed. 968 (1842); Reaves v. Ainsworth, 219 U. S. 296, 304, 306, 55 L. Ed. 225, 31 S. Ct. 230 (1911), *affirming* 28 App. D. C. 157 (D. C. Cir. 1906); Creary v. Weeks, 259 U. S. 336, 66 L. Ed. 973, 42 S. Ct. 509 (1922); French v. Weeks, 259 U. S. 336, 66 L. Ed. 965, 42 S. Ct. 505 (1922); Reid v. United States, 161 Fed. 469 (S. D. N. Y. 1908), *writ of error dismissed*, 211 U. S. 529, 53 L. Ed. 313, 29 S. Ct. 171 (1909); Davis v. Woodring, 72 App. D. C. 83, 111 F. 2d 523 (D. C. Cir. 1940); Schustack v. Herren, 234 F. 2d 134 (2d Cir. 1945); Nelson v. Peckham, 210 F. 2d 574 (4th Cir. 1954); Bernstein v. Herren, 136 F. Supp. 493 (S. D. N. Y. 1955), 141 F. Supp. 78 (S. D. N. Y. 1956), *aff'd*, 234 F. 2d 434 (2d Cir. 1956); Weeks v. United States, 51 App. D. C. 195, 277 Fed. 594 (D. C. Cir. 1922), *aff'd sub nom.* Creary v. Weeks, 259 U. S. 336, 66 L. Ed. 973, 42 S. Ct. 509 (1922); Marshall v. Wyman, 132 F. Supp. 169 (N. D. Cal. 1955); Nordmann v. Woodring, 28 F. Supp. 573 (W. D. Okla. 1939); McKenzie v. Kirkpatrick, 141 F. Supp. 49 (N. D. Cal. 1956).

[11] 90 U. S. App. D. C. 75, 77, 193 F. 2d 924, 927 (1951), *cert. denied*, 342 U. S. 943, 96 L. Ed. 702, 72 S. Ct. 556 (1952).

It is said that the foregoing statement was *dictum*. Whether that be so or not, we think the statement is correct. We adhere to it and adopt it for application here.

The import of the opinion of the Supreme Court in *Orloff* v. *Willoughby*[12] is the same as that of the opinions we have cited. There a physician inducted into the Army under the Doctors Draft Act[13] refused to state whether he was a member of the Communist Party. Because of this refusal he was not commissioned or given the duties of an Army doctor. He applied to a federal court for *habeas corpus* and for a discharge. He urged that it had been a uniform practice to commission Army doctors and, furthermore, that his induction under the Doctors Draft Act contemplated and required that he be given a commission. The Supreme Court held that the courts have no power to review such a matter, which fell within the executive duties of the President and the Army. The Court observed:

> "We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject

[12] 345 U. S. 83, 97 L. Ed. 842, 73 S. Ct. 534 (1953).
[13] 64 Stat. 826 (1950), 50 U. S. C. A. App. § 454(i).

to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service." [14]

Reason and the practicalities dictate the rule which we have found in the cases. Reason, flowing from the doctrine of the separation of powers, dictates that in many fields the administrative discretion of the executive branch and the legislative discretion of the legislative branch be not subject to interference or review by the courts. In no field is this doctrine more pertinent and important than in the operation of the armed forces. Provisions for the establishment and operation of such forces necessary to the security of this country are wholly legislative matters, and the administration of those forces is the very essence of executive action. The Constitution so provides. Only in the most extreme cases can the judiciary interfere in this area. As a practicality the operation of military forces requires expeditious, sometimes instant, action and thus requires discipline. From the standpoint of the Army it is easy to see the disastrous effect upon discipline if the type of discharge which could be given an enlisted man were not within the power of the commanding officer or the Secretary, but were subject to litigation and to review and decision by a court wholly removed from the necessities of military affairs. As a further matter of practicality, from the standpoint of the courts review of such matters would impose an appalling burden, with which the courts are wholly unequipped to cope.

Harmon's insistence is that the type of discharge given him must be determined by the character of his military service and without regard to pre-induction events, activities, etc. But that is not our question. Our question is not what type of discharge he ought to be given; it is whether a court of review can determine the type of discharge. Harmon says a court can and must do so. To reach that conclusion a number of propositions are suggested.

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[14] 345 U S. at 93-94.

The first such proposition concerns procedural due process. Harmon was given an opportunity to reply to the alleged derogatory information and was then issued a discharge. Thereafter he was given a hearing before the Army Discharge Review Board. He appealed that Board's adverse decision to the Army Board for the Correction of Military Records, again without success. Later, in connection with a direct appeal to the Secretary, he was offered a second hearing, which he declined. Harmon was thus given the full measure of procedural rights afforded by the Congress for persons in the military service. The Supreme Court held in *Reaves* v. *Ainsworth*,[15] "Besides, what is due process of law must be determined by circumstances. To those in the military or naval service of the United States the military is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts."

Harmon urges that the Army violated Directive 5210.9 by failing to give him a hearing. He was notified on May 26, 1954, of his proposed discharge. The Directive provides "an opportunity upon request to present any cause why he should not be so separated." Harmon made no such request. Later, as we have pointed out, he was afforded a hearing before the Review Board. The requirements of procedural due process were met.

We find no question of substantive due process. The consideration of pre-induction activity was not frivolous, arbitrary or discriminatory; it was based upon reasonable grounds. Activity in the Communist movement involves participation in a conspiracy dangerous to our national security. Surely the Army cannot be compelled to retain a security risk in its service. Surely the President may apply to military personnel the same program and policies

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[15] 219 U. S. 296, 304, 55 L. Ed. 225, 31 S. Ct. 230 (1911). And see Burns v. Wilson, 346 U. S. 137, 97 L. Ed. 1508, 73 S. Ct. 1045 (1953).

as to security and loyalty which he applies to civilian personnel in sensitive positions in the Government civilian service.[16] Harmon does not contend that he could not be separated from the service because of pre-induction conduct. If that be so, if he can be discharged as a security risk, the Army can determine whether he is or is not a security risk. And in that determination surely no data is more relevant and material than are his past habits, activities and associations. Such data is universally the material from which a determination of character or suitability is made, if indeed it is not the only material from which it can be made. The Army, in making that determination, was not trying to find him guilty or not guilty of some act or offense. It was trying to determine his character as a security risk *vel non* and his consequent suitability for Army service. If it could make that determination, as admittedly it could, and upon that basis could determine whether a man was suitable for any service whatsoever, it could include that consideration among the factors to be considered in determining the value of his service and, consequently, in selecting the type of discharge to be given him. Moreover it is reasonable for Army authorities to believe that a security risk is not usable for many types of military service required of other soldiers, and that factor may well affect the value of the military service of such a person and, consequently, the type of discharge given him.

An honorable discharge from the Army is, as Harmon claims it is, a mark of distinction. The courts cannot dictate to the Army that it must give this mark to an enlisted man when it finds, on the basis of pre-induction activities, that his presence in the armed forces is not consistent with the national security.

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[16] See Cole v. Young, 351 U. S. 536, 100 L. Ed. 1396, 76 S. Ct. 861 (1956); *cf.* Jason v. Summerfield, 94 U. S. App. D. C. 197, 214 F. 2d 273 (D. C. Cir. 1954), *cert. denied*, 348 U. S. 840, 99 L. Ed. 662, 75 S. Ct. 48 (1954).

It is suggested that a general discharge under honorable conditions imposes a "stigma" and so is punishment. Punishment, it is said, cannot be inflicted without judicial scrutiny. The Army can impose punishment, even the punishment, of death, without judicial review.[17] Moreover the type of a discharge is not punishment in the sense that judicial process is required. No finding of guilt, no loss of liberty are involved. The penalty is the same as that which results from many unhappy expeirences. Consideration of such "penalties" must begin in perspective. A discharge from civilian, commercial employment carries penalties in a real sense—stigma, loss of pay, difficulty in subsequent employment; but no one would suggest that an employer cannot discharge an employee without judicial scrutiny. A civilian employee of the Government can be dismissed upon charges of a criminal offense without judicial review.[18] The courts do not interfere in such matters. When the same "penalties" arise from action of military authorities, they do not thereby become "punishment" necessitating judicial action.

Stigma attaches on rejection from military service as a security risk. Indeed, if one be rejected entirely, on account of being a security risk, the adverse effects are greater than upon receiving a General Discharge Under Honorable Conditions. Many benefits attach to status under the latter which do not attach to rejection. And the intangibles of stigma attach in either event. Nevertheless it certainly cannot be urged that the Army may not reject, without judicial review, as a security risk one registered for service.

It is suggested that an honorable dicharge is of so great value that a man can be denied one only if he be afforded a right to judicial review. To hold to that effect

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[17] Burns v. Wilson, 346 U. S. 137, 97 L. Ed. 1508, 73 S. Ct. 1045 (1953).

[18] See, *e.g.*, Eberlein v. United States, 257 U. S. 82, 42 S. Ct. 12, 66 L. Ed. 140 (1921).

woudl be to vitiate the whole discharge process provided by the Secretary.[19] The courts have no authority to take such action. They cannot arrogate to themselves supervisory authority over the Army. Apt on this point is another quotation from *Reaves* v. *Ainsworth, supra.* The Supreme Court said:

> "The courts have no power to review. The courts are not the only instrumentalities of government. They cannot command or regulate the army. T o be promoted or to be retired may be the right of an officer, the value to him of his commission, but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the army. • • • If it had been the intention of Congress to give to an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion and carry them over the head of the President to the courts, and there litigated, it may be, through a course of years, upon the assertion of error or injustice in the board's rulings or decisions, such intention would have been explicitly declared. The embarrassment of such a right to the service, indeed the detriment of it, may be imagined." [20]

There is a margin of value of an "Honorable Discharge" over a "General Discharge Under Honorable Conditions". But a considerable measure of value is involved in a Government job, such as was involved in *Williams* v. *Cravens,*[21] and in the right of a contractor, such as were involved

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[19] On March 18, 1954, Robert T. Stevens, then Secretary of Defense, told the Senate Armed Services Committee: "When the evidence fails to show that he is disloyal, or is subversive, but does establish that he is otherwise a security risk and should be eliminated, he is separated under honorable conditions, usually with a general discharge." *Hearings on S. 3096,* 83d Cong., 2d Sess. 75.

[20] 219 U. S. at 306.

[21] 93 U. S. App. D. C. 380, 210 F. 2d 874 (D. C. Cir. 1954), *cert. denied,* 348 U. S. 819, 99 L. Ed. 646, 75 S. Ct. 30 (1954).

in *Larson* v. *Domestic & Foreign Corp.*,[22] and in a public utility business, such as was involved in *Kansas City Power & Light Company* v. *McKay.*[23] Yet in all these instances the holders of the rights were deprived of them without court review.

It is suggested that the consideration of pre-induction happenings is in conflict with the traditional policies of the Army. Most certainly we cannot order the Army to adhere to traditional practices. The armed forces in 1953-54 faced many new problems not involved in the operation of the military services of the 1770's, or the 1860's, or in 1917-18, or even in the early 1940's. Activity in the Communist movement now involves a possible conspiratorial participation dangerous to the security of this country. The efforts of this movement to infiltrate all parts of the Government pose new problems, which must be met with new rules and regulations.

Harmon argues that the pre-induction events considered by the Army were political opinions and so could not validly be considered under the First Amendment. Activity in the world Communist movement has long since passed the boundaries of mere political opinion. It may well make a man a security risk, and, as we have pointed out, the courts cannot compel the Army retain in its service a security risk.

We come now to the second of Harmon's prayers, that the court direct the issuance to him of an honorable discharge. It is settled beyond question that the courts will not direct by *mandamus* any executive action which lies within the realm of executive discretion.[24] This is a rule

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[22] 337 U. S. 682, 93 L. Ed. 1628, 69 S. Ct. 1457 (1949).

[23] 96 U. S. App. D. C. 273, 225 F. 2d 924 (D. C. Cir. 1955), *cert. denied*, 350 U. S. 884, 100 L. Ed. 780, 76 S. Ct. 137 (1955).

[24] Anderson v. McKay, 94 U. S. App. D. C. 11, 211 F. 2d 798 (D. C. Cir. 1954), *cert. denied*, 348 U. S. 836, 99 L. Ed. 660, 75 S. Ct. 51 (1954). See discussion and cases cited in Clackamas County, Ore. v. McKay, 94 U. S. App. D. C. 108, 219 F. 2d 479 (D. C. Cir. 1954).

of law quite apart from the peculiar insulation of Army affairs from judicial scrutiny. Harmon's prayer that the court direct the issuance to him of an honorable discharge is certainly a prayer for *mandamus*, and certainly the Congress has lodged within the area of executive discretion the selection of types of discharges to be given military personnel. So this prayer in Harmon's complaint does not lie within the jurisdiction of the court under the general rule applicable to all types of executive action. Even if such a prayer for mandatory direction ran only to a civilian matter which none of the elements of a military affair, the courts would have no authority in respect to it.

Affirmed.

BAZELON, *Circuit Judge*, dissenting: Appellant is a youth who was plucked out of civilian life and made a soldier, as are many others, at the threshold of the career he was planning for himself. Before the end of his term of service, he was restored to his civilian status, but hung about his neck was the millstone of "security risk." The Army has information about his civilian activities and associations on the basis of which it believes it would not be in the national interest to retain him as a soldier, but his military service is admitted to have been "excellent" and he is not claimed to have done anything illegal or reprehensible during his tour of duty. He does not challenge the discretion of the Secretary of the Army to judge whether the national security is served by dismissing a soldier. He complains only that, in the exercise of that discretion, there is neither necessity nor authority for inflicting upon him a gratuitous wound which may plague him all the rest of his days.

Appellant was inducted into the Army on October 31, 1952, as a draftee. On February 9, 1954, the Adjutant General of the Army informed him that the Army had received "derogatory" information about him and ordered

him to reply thereto. He replied in writing on March 11, 1954. On April 2, 1954, the Adjutant General of the Army, acting by order of appellee, informed appellant that, upon review of the derogatory information and appellant's replies thereto, it had been determined that appellant would not be discharged under AR 615-370 as disloyal or subversive, but would be retained in his grade until completion of his service period, at which time he would receive a discharge "appropriate to the character of service" he had rendered.[1] Five days later, the Secretary of Defense promulgated his Directive 5210.9, purporting to apply to military personnel the criteria of the civilian security program, Executive Order 10450 (April 27, 1953, 18 FED. REG. 2489), and to authorize dismissal of a soldier as a security risk if "on all the available information it is determined that [his] retention is [not] clearly consistent with the interests of national security." On

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[1] This comported with the traditional Army policy that the type of discharge be governed entirely by the service record, absent some disqualification covered by specific regulation. Thus, though a less than honorable discharge certificate can be given to a homosexual, a drug addict, a chronic alcoholic, a habitual shirker, a person with psychopathic personality, or a repeated petty offender (AR 635-208, formerly AR 615-368); to a deserter, a soldier who has entered the Army by fraud, or one who is convicted of crime in a civil court (AR 635-206, formerly AR 615-366); or to one who is "determined by investigation to be disloyal or subversive" (AR 615-370, as implemented by Special Regs. 600-220-1); where there is no such fault, an honorable discharge is called for if the soldier's conduct has been rated at not less than "good" and his efficiency at not less than "fair" (AR 635-200, par. 2). Former Secretary of the Army Stevens told a Senate Committee:

> The traditional policy of the Army has been that the discharge given should reflect the service rendered. In other words, a man whose conduct has been faithful and honest during the time in the service would be entitled to separation under honorable conditions, notwithstanding what his conduct may have been prior to entering the service. *Hearings, Senate Armed Services Committee on S. 3096*, 83d Cong., 2d Sess., March 18, 1954, at p. 75.

May 26, 1954, the determination to let appellant complete his service was reversed and he was informed that he would be given an "undesirable" discharge under AR 615-370 prior to the expiration of his service period. On June 2, 1954, he received such a discharge.[2]

Appellant sought unsuccessfully to have his discharge changed to "honorable," first by appeal to the Army Discharge Review Board and then, in turn, to the Army Board of Correction of Military Records and the Secretary of the Army. Having exhausted all possible administrative remedies, he commenced this suit seeking a declaration that his undesirable discharge was void and an order that it be changed to an honorable discharge. Cross-motions for summary judgment were made. The District Court, concluding that it lacked jurisdiction of the cause, denied appellant's motion and entered summary judgment against him. This appeal followed.

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[2] Defense Directive 5210.9 provides that the separation report of a soldier discharged as a security risk "will cite as authority the appropriate Armed Service directive under which separation is effected." Par. VIII-F-6. On June 2, 1954, when appellant was given his undesirable discharge, there was no specific Army directive dealing with security risks. AR 615-370, which was cited in the separation report as authority for the discharge, permits an undesirable discharge only upon a determination that the soldier is "disloyal or subversive." No such determination having been made regarding appellant, AR 615-370 was inapplicable. Indeed, appellee asserts that it was cited by mistake, the real basis for appellant's discharge being Directive 5210.9 itself.

By the time the Army Discharge Review Board reviewed appellant's discharge on April 11, 1956, and upgraded it to "General," the Army had already promulgated its specific "Personnel Security Clearance" regulations, AR 604-10, July 29, 1955. But those new regulations were not cited in the corrected separation report as authority for the action. The only additional authority cited for the new action was "Sec. 301, P. L. 346" which is merely the provision for review procedure. 58 STAT. 286 (1944), 38 U. S. C. § 693(h). Thus the only basis for appellant's discharge remains Defense Directive 5210.9.

The derogatory information the Army had about appellant was that he had been employed at what was "reported to be a Communist operated camp"; that he had been employed by the Detroit Urban League "reported to be a subversive organization"; that he had once "registered to vote in New York City with the American Labor Party * * * cited by the House Committee on Un-American Activities as being under Communist control * * *"; that he had solicited contributions for the defense of Smith Act prosecution defendants; that his father was reported to be a Communist and connected with various organizations cited as subversive by the Attorney General and to have registered many times with the American Labor Party; that his step-mother had registered with the American Labor Party for about ten years; and that he associated wtih Communists or Communist sympathizers.[3] In his written reply of March 11, 1954, appellant admitted summer employment by the camp as a kitchen-helper and assistant breakfast cook and by the Urban League as a counselor in its camp for under-privileged negro children. Concerning registration with the American Labor Party,

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[3] On May 7, 1953, the Army, without revealing this derogatory information to appellant, used it as the basis for interrogating him. On that occasi appellant denied that he was or had ever been a Communist or a member of any subversive organization, gave some details concerning persons about whom he was asked, described the circumstances under which he solicited funds for the defense of the Smith Act defendants, and gave sundry other information. With respect to a number of questions, appellant invoked his privilege under the Fifth Amendment and under Article 31 of the Uniform Code of Military Justice, 64 Stat. 118, 50 U. S. C. § 602, against self-incrimination. He later explained that he had invoked his privilege as a result of fear and apprehension growing out of the circumstances of the interrogation and the fact that he was without counsel. The questions as to which he had invoked the privilege were put to him again in the February 9, 1954, order and he answered all of them, except those relating to his parents. As to those, his refusal was based not on privilege, but rather on "moral indignity [*sic*]," "filial piety," and the assertion that they were irrelevant.

he had admitted it when first interrogated in May 1953,[4] and now added only that, since it was a legally recognized political party, he felt he could properly vote for it. Similarly, he had earlier admitted soliciting funds for the defense of two Smith Act indictees, and now merely added that he felt he had a right to do so. He denied that he was or had ever been a member of the Communist Party, but said that it was possible that he had known or been acquainted with Communists or sympathizers. The allegations concerning his parents he refused to reply to, as he had at his earlier interrogation. The District Court noted in its opinion that "Save for plaintiff's continuing association with his parents and for writing one letter requesting contribution for the legal defense of two persons indicted under the Smith Act, all charges against plaintiff were based on conduct antedating his induction into the Army."[5]

In his complaint, appellant alleged that his character and efficiency rating had been "excellent." In his first answer, filed July 19, 1955, appellee admitted this allegation. On November 29, 1955, however, by amended answer, he pointed out that for about a week in July 1953 and for the period after April 24, 1954 (shortly before his discharge was ordered) appellant's rating was recorded as "unknown." But, under Army regulations, "ratings of 'unknown' and ratings for periods for less than two months are not 'disqualifying.'"[6]

Appellant also alleged that he was not and had never been a member of the Communist Party, or any Communist organization, or any organization advocating overthrow of the government or advocating or approving violence in denying others constitutional rights, or any organization seeking to alter our form of government by

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[4] *Supra*, note 3.

[5] Harmon v. Brucker, 137 F. Supp. 475, 476 (D. D. C. 1956).

[6] AR 615-360, par. 8b.

unconstitutional means, or any organization which, so far as he knew, had ever engaged in subversive activities. He also alleged that he was and always had been "completely and unswervingly loyal to the Government of the United States" and that he "would not hesitate to lay down his life in defense of the United States against any and all of its enemies whomsoever." Appellee denied these allegations, not on the ground that he believed them to be untrue but because of "lack of knowledge and information sufficient to form a belief" concerning them.

Appellee's first contention is that we should not even reach the question whether the District Court correctly declined jurisdiction. He informs us that, after this appeal was filed, the Adjutant General notified appellant that the character of his discharge had been upgraded from "undesirable" to "General (under honorable conditions)" and he asserts that there is, therefore, no longer a judicially cognizable case or controversy.[7] This new form of discharge, however, is not the legal equivalent of the honorable discharge which appellant sought.

It may well be, as appellee states, that none of the benefits available to discharged soldiers under federal law are withdrawn from the holder of such a "general" discharge as this. Many benefits are conferred, however, by the statutes of the State of New York, where appellant resides, and those statutes all use the language "honorable discharge" or "honorably discharged." Although the New York courts have not decided whether this excludes holders of a discharge entitled "General (under honorable conditions)", the late Judge Frank of the Court of Appeals

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[7] The majority expresses no specific opinion as to this contention. It would seem, however, since the majority proceeds to deal with the question of the District Court's jurisdiction, that it rejected the contention that there is no longer a judicially cognizable case or controversy.

for the Second Circuit suggested that it would.[8] But whatever may be said of the technical legal equivalence or difference between the two types of discharge, from a real-life point of view they are vastly different. The portion of our population holding honorable discharge certificates from the armed services is now so great that an adverse reflection is inherent in a certificate which is other than "honorable."[9] This is of, course, confirmed by the statement of appellee's counsel in oral argument that "every soldier gets an honorable discharge unless there is some blemish on his record on account of which he receives a discharge other than honorable."

Nor is the new form of discharge defensible on the ground that the separation report does not on its face indicate that it was based on security considerations. The same observation could be made concerning the "undesirable" discharge. In both instances, however, a person sufficiently interested to check army regulations would discover the "security" character of the discharge. In the case of the "undesirable" discharge the only reference to

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[8] "Although a General Discharge (Under Honorable Conditions) apparently entitles a veteran to most, if not all, benefits under federal law, the statutes of New York, of which plaintiff is a resident, requires [*sic*] that a veteran have an Honorable Discharge in order to be eligible for various benefits under state law. See *e.g.*, New York Military Law Sections 245, 250; New York General Municipal Law Section 148; New York Education Law Section 609; New York General Business Law Section 32." Schustack v. Herren, 234 F. 2d 134, 135 n. 2 (2d Cir. 1956).

[9] What the Supreme Court said in Wieman v. Updegraff, 344 U. S. 183, 190-91 (1952), concerning the discharge of an employee on disloyalty grounds is, we think, not inapplicable here:

> There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when "each man begins to eye his neighbor as a possible enemy."

security was the citation of the "disloyal or subversive" regulation, AR 615-370, as the "Reason and Authority for Separation." The separation report accompanying the "General" discharge recited that "Para. 10, AR 615-120 applies." This regulation was cited, according to appellee, "to inform recruiting officers that appellant is ineligible for enlistment in the Regular Army." [10] As anyone may discover, this is a reference to AR 604-10, paragraph 15d, which provides:

> No applicant will be appointed or enlisted without the specific approval of the Secretary of the Army if his separation from previous service indicates that he was relieved from active duty or discharged either as a security risk or for reasons other than security while undergoing investigation under the provisions of these regulations or of corresponding security regulations issued by the other military departments. AR 615-120 applies with respect to former members of the armed services seeking enlistment or reenlistment in the Army.

See also Defense Department Directive 5210.9, par. II.

Our jurisdiction to entertain the appeal being unimpaired, the next question to consider is the District Court's ruling that, under our decision in *Gentila* v. *Pace*, 90 U. S. App. D. C. 75, 193 F. 2d 924 (1951), it was "constrained" to disclaim jurisdiction of the cause.

"Stripped of self-contradiction and legal conclusions all that [Gentila's] complaint allege[d]" was that his dishonorable discharge for desertion rested upon "an erroneous finding of fact" that he was mentally capable of forming an intent to desert. We held that "merely

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[10] Compare, in this connection, Bailey v. Richardson, 86 U. S. App. D. C. 248, 257-58, 182 F. 2d 46, 55-56 (1950), *affirmed by an equally divided Court*, 341 U. S. 918 (1951), in which in sustaining the validity of the Government's civilian employee loyalty program, we pointed out that "mere dismissal from the Government service" is not punishment in the sense that permanent proscription from Government service had been held to be in United States v. Lovett, 328 U. S. 303, 316 (1946).

erroneous findings of fact by the Discharge Review Board shall not be revised by a court." 90 U. S. App. D. C. at 77, 193 F. 2d at 927. Although the District Court recognized that the instant case involved questions of law, it nevertheless thought *Gentila* controlling on the ground that both cases also involve "a review of the findings upon which the separation was based * * *." *Harmon* v. *Brucker*, 137 F. Supp. 475, 477 (D. D. C. 1956). In this the District Court was wrong. The "findings upon which the separation [in the present case] was based" are not challenged at all. Indeed, as the majority opinion points out, appellant does not challenge the appellee's power to remove him from the Army on mere suspicion that he is a security risk.[11] But, whether or not the interests of national security justify dismissing a soldier on mere suspicion, appellant claims that those interests are not served by branding such a soldier as a security risk as he passes through the gate.[12] The issue he raises is one of law; whether appellee may withhold an honorable discharge from a soldier whose conduct and efficiency ratings have never been less than "excellent," even assuming the correctness of all of the information appellee relies upon. That claim being "wholly dependent upon a question of law," it is within the jurisdiction of the Dis-

[11] Cf. Bailey v. Richardson, *supra*, note 10, 86 U. S. App. D. C. at 263, 182 F. 2d at 61: "The Constitution does not require the President to continue to use in the training of Government personnel, the work performed by this appellant, a person whose loyalty to the Government he suspects. There is no reason in the Constitution why the President should not limit the training staff to persons whose loyalty is beyond the faintest shadow of suspicion."

[12] Even in the case of a civilian Government employee who sought the position he holds, rather than being drafted, although we said that "mere dismissal" is not punishment and that there is no redress for injury suffered "in the process of dismissal," we recognized no authority to inflict gratuitous injury over and above the dismissal. Bailey v. Richardson, *supra*, note 10, 86 U. S. App. D. C. at 257-58, 265, 182 F. 2d at 55-56, 63.

trict Court. *United States* v. *Williams*, 278 U. S. 255, 257-58 (1929); NOTE, 70 HARV. L. REV. 533, 539-40 (1957). Nothing in *Gentila* v. *Pace, supra*, is to the contrary. Nor can I accept it as settled (either by this court or the Supreme Court) that courts may not in circumstances like these review the issuance of a less than honorable discharge. As was pointed out in *Schutack* v. *Herren*, 234 F. 2d 134, 135 n. 1 (2d Cir. 1956), "The Supreme Court has not yet spoken on the question of 'whether and to what extent the courts have power to review or control the War Department's action in fixing the type of discharge certificates issued to soldiers [footnote omitted] * * *.' Patterson v. Lamb, 329 U. S. 539, 542, 67 S. Ct. 448, 449, 91 L. E. 485." In the footnote, the Supreme Court referred, among other authorities, to the decision of this court in *Denby* v. *Berry*, 51 App. D. C. 335, 279 Fed. 317 (1922), *reversed on other grounds*, 263 U. S. 29 (1923). In that case we held "void and without authority of law" what we thought to be a discharge which did not comport with statutory procedure.[13] See also *Davis* v. *Woodring*, 72 U. S. App. D. C. 83, 85, 111 F. 2d 523, 525 (1940).

That appellant seeks, in addition to a declaration that the discharge given him was void, an order that he be given an honorable discharge does not, in my view, deprive the District Court of jurisdiction. If, upon review, the discharge given appellant is declared to be void, we must assume that the Secretary would issue a discharge which is not void. *Denby* v. *Berry, supra*. Moreover, if the District Court finds the denial of an honorable discharge to rest on legally insufficient grounds, it may, at

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[13] Our decision was reversed by the Supreme Court upon the ground that what we considered a discharge was actually merely a transfer from active to inactive status, something wholly within the discretion of the commander-in-chief.

least, enjoin a denial for such reasons. *Perkins* v. *Elg*, 307 U. S. 325, 349-50 (1939); *Shachtman* v. *Dulles*, 96 U. S. App. D. C. 287, 294, 225 F. 2d 938, 940 (1955).

Both parties request that we decide the merits of this controversy—namely, whether the Universal Military Training and Service Act of 1948, 62 STAT. 606, 50 U. S. C. App. § 454(b),[14] pursuant to which Directive 5210.9 was promulgated, authorizes issuance of less than an "honorable discharge" certificate, in the circumstances of this case. But I think that since the District Court never reached consideration of the merits, sound judicial practice requires that it should first have that opportunity.

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[14] The statute sets the draftee's term of service at two years, "unless sooner released, transferred, or discharged in accordance with procedures prescribed by the Secretary of Defense * * *"